IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940

No. 64

[illegible] MIRROR COMPANY, a corporation, and L. D. [illegible],

*Petitioners,*

*vs.*

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

*Respondent.*

## SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.


WM. B. MCKESSON,
*Deputy County Counsel,*
1100 Hall of Records, Los Angeles,
ALLEN W. ASHBURN,
1020 Edison Building, Los Angeles,
MICHAEL G. LUDDY,
1225 Citizens National Bank Bldg., Los Angeles,
ISAAC PACHT,
510 Union Bank Building, Los Angeles,
*Attorneys for Respondent.*

*Of Counsel:*
ARNOLD PRAEGER,
J. H. O'CONNOR,
*County Counsel,*
DOUGLAS DECOSTER,
*Chief Deputy County Counsel,*
S. V. O. PRICHARD,
*Assistant County Counsel.*



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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

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## SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

This document is submitted as a supplement to the "Brief for Respondent in Opposition to Petition for Writ of Certiorari", heretofore filed herein, and not as a substitute.

### Statement.

#### The Narrow Issues of the Case.

By their petition, supporting brief and additional brief petitioners have reduced this case to two questions: (1) whether rejection of a "clear and present danger" rule in favor of the "reasonable tendency" criterion is a denial of due process of law or equal protection of the laws; and (2) whether the evidence is sufficient to warrant a holding

that the conviction of petitioners was not merely "an arbitrary pretense for an arbitary punishment" of "innocent conduct" (Mr. Justices Holmes in *Patterson v. Colorado*, 205 U. S. at 460) or, as elsewhere phrased, "mere arbitrary or capricious exercise of power" (*American Ry. Exp. Co. v. Kentucky*, 273 U. S. at 273).[1]

Solemn warnings from counsel supporting petitioners that the freedom of the press must be preserved as a bulwark of our liberties, a defense and an offensive against totalitarianism, do not advance the argument very far. We are still left with the problem of delimiting the bounds of such freedom. Respondent and respondent's counsel[2] are as much interested as petitioners in preserving that right in the sense which is "implicit in the concept of ordered liberty";[3] but to preserve that sort of freedom it is necessary to uphold "the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends", for "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which

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[1]This court will not review the evidence to determine whether it is sufficient to convict under the reasonable tendency rule. That is a state court question upon which the findings below are binding (*Grayson v. Harris*, 267 U. S. 352, 357; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 397). Only in the event of rejection of the reasonable tendency criterion will it become necessary for this court to review the sufficiency of the evidence to determine, as suggested in the petition (p. 5), whether "the 'clear and present danger' test, if applied to the editorials, disclose(s) a legitimate exercise of the right of freedom of speech and of the press." This matter is discussed at pages 49-52, *infra*.

[2]"The earliest record of a local bar association in the field of civil liberties is that of the Committee on Constitutional Rights of the Los Angeles Bar Association. This committee was organized about ten years ago in 1930" (Bill of Rights Review, Vol. I, No. 1, p. 74).

[3]Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 325.

the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions."[4]

All other questions, such as the constitutionality of subdivision 13, Sec. 1209, California Code of Civil Procedure, and the argument based upon Sir John Fox's criticism of the procedural phases of *Rex v. Almon*, have been waived. Review upon *certiorari* is confined to the points raised in the petition.[5]

**The Nature of the Freedom Guaranteed to the Press.**

Petitioners have not embraced Mr. Justice Edmonds' thesis that contemptuous publications are immune to punishment. They concede that freedom of the press or freedom of speech is not an absolute right or liberty. And counsel concede that their version of the guaranty of a free press "would not justify interference with one judge or one judicial proceeding", further asserting that "All that need appear is that an immediate and serious interference with a court proceeding was advocated or was to be expected" (Petnrs. Br. p. 16).

Thus the process of balancing individual liberties against public interests, the obligation to "reconcile the conflicting claims of liberty and authority"[6] (finding early recognition in *Reynolds v. U. S.*, 98 U. S. 145, and *Davis v. Beason*, 133 U. S. 333, the Mormon Church cases, and continu-

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[4]*Toledo Newspaper Co. v. United States* 247 U. S. 402, 419.

[5]*Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, 604-5; *State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242; *Washington, etc. Co. v. National L. Rel. Bd.*, 301 U. S. 142, 146.

[6]*Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 994 (not yet published in official reports).

ously pursued by this court),[7] is conceded to be necessary in matters of contempt of court as in other governmental affairs.

The conception of independent courts, uninfluenced by extraneous forces, is so deeply rooted in our constitutional system that a specific guaranty has seldom been deemed necessary;[8] but it is fundamental and is recognized as a public necessity which the guaranty of free speech or freedom of the press cannot be permitted to impair.

Petitioners cite the treatise on "Power of Congress Over Procedure in Criminal Contempts", etc. (37 Harv. L. Rev. 1010), by Professors Frankfurter and Landis. The authors say at page 1020:

> "At the time of the framing of the Constitution, a few basic ideas, more or less definite, had clustered around the very notion of a court. Naturally enough, the Supreme Court, as occasion arose, inferred these ideas from the term 'Courts' and thereby, for practical purposes, wrote them into the Constitution.
>
> "These limiting conceptions may be thus defined: * * * (2) Independence of judgment must be left to the court in cases where it may decide."

Freedom of speech rests on no higher plane than religious liberty, "an interest inferior to none in the

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[7]See *Near v. Minnesota*, 283 U. S. 697, 715; *Schneider v. State*, 308 U. S. 147, 160; *Thornhill v. Alabama*, 310 U. S. 88, 96; *Cantwell v. Connecticut*, 310 U. S. 296, 303-4, 310; and lastly, *Minersville School Dist. v. Gobitis*, 84 L. Ed. (Adv. Op.) 993, 995-6.

[8]It first found expression in Magna Charta, and has been carried into several state constitutions. See 12 *C. J.*, Sec. 1100, p. 1287; 16 *C. J. S.*, Sec. 708b, p. 1492; *State v. Owens*, 125 Okla. 66, 75.

hierarchy of legal values" (*Minersville School District* case, 84 L. Ed. at page 996). The court in the *Minersville* case, by reference to the *Reynolds* decision and other cited authorities, showed that the external exercise of religious liberty has always been required to yield to the demands of public authority reasonably exercised. At page 996, the court further said:

> "In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom."[9]

The introduction to Sir John Fox's excursion into the realms of procedural antiquity in contempt matters (*Fox on Contempt of Court*) says this at page 1:

> "The punishment of contempt is the basis of all legal procedure * * *."

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[9]The California Constitution expressly recognizes the proper limitations of all these fundamental liberties. Sec. 9, Art. I, says: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. * * *" And Sec. 4 of Art. I: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state; * * * but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

And the California Supreme Court:

> "Liberty of the press stops where a further exercise would invade the rights of others. This provision of the Constitution does not authorize a usurpation of the functions of the courts" (*In re Shortridge*, 99 Cal. at 535).

The Circuit Court of Appeals for the Ninth Circuit said:

> "Liberty of the press is subordinate to the independence of the judiciary, and it is not expedient that any class in the community should be privileged to interfere with the rights of litigants or to embarrass or obstruct the administration of justice. 6 R. C. L., 510, Sec. 22." (*In re Independent Publishing Co.*, 240 Fed. 849, 861.)

And this court in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419:

> "2. The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.
>
> "We might well pass the proposition by because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity, and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. The safeguarding and fructification

> of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing."

Indeed, *amicus curiae* Hanson concedes that "power to punish for contempt by publication" "is entrenched in our jurisprudence as one of the so-called inherent powers of the courts" (Br. p. 6); that a recognition of "the unflinching determination of this Court to condemn every conceivable form of abridgment of the press from any source and by any method" does not connote an assertion "that the constitutional guarantee is so literally absolute as to exempt the press from answerability for abuses to which the general laws apply" (Br. p. 10); and "that the maintenance of an independent judiciary is of equal importance to the maintenance of a free press" (Br. p. 13).

By way of delimiting the bounds of these liberties (freedom of speech and of the press) in their relation to the courts, the common law has long defined as a transgression from exercise to abuse any communication uttered outside a court proceeding under circumstances giving it a reasonable tendency to exercise an influence upon the pending cause over and above that of evidence and argument adduced in open court.

## I.

### Reasonable Tendency to Influence or Interfere With a Pending Proceeding Is the Only Accepted Criterion.

This test is of indubitable antiquity; it came to us as part of the common law at the formation of the nation. Mr. Chief Justice Hughes, after examining "the historic conception of the liberty of the press", said in *Near v. Minnesota*, 283 U. S. at 715:

> "But it is recognized that punishment for the *abuse*[9a] of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. *There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions.* Patterson v. Colorado, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556, 10 Ann Cas. 689; Toledo Newspaper Co. v. United States, 247 U. S. 402, 419, 62 L. Ed. 1186, 1193, 38 S. Ct. 560."

In addition to the *Patterson* and *Toledo* cases, this statement was fortified by citation of *Huggonson's Case*, 2 Atk. 469, 26 Eng. Rep. 683; *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155, and numerous early state cases (in footnote 5).

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[9a] All italics ours, unless otherwise indicated.

*Huggonson's Case* (also known as *Roach v. Garvan*) was decided in 1742 and announced the reasonable tendency doctrine. Lord Hardwicke there said in part (p. 683):

> "Lord Chancellor. Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented: nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard. (*Vide* Baker v. Hart, *post*. 488. Mrs. Farley's case, 2 Ves. 520.)"

At page 685:

> "There may be also contempt of this court, in prejudicing mankind against persons before the cause is heard.
>
> "There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.
>
> * * * * * * * *
>
> "There are several other cases of this kind: one strong instance, where there was nothing reflecting upon the court, is the case of Captain Perry, who printed his brief before the cause came on: the offence did not consist in the printing, for any man may give a printed brief, as well as a written one, to counsel, but the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard.
>
> "Upon the whole, there is no doubt, but this is a contempt of the court."

The same doctrine was announced and applied in the *Anonymous Case* reported in 2 Ves. Sen. 520, 28 Eng. Rep. 332, which was decided in 1754, and in *Rex v. Jolliffe*, 4 T. R. 285, 100 Eng. Rep. 1022, decided in 1791. And this is still the law of England.

*Rex v. Tibbits*, L. R. (1902), 1 K. B. 77, 85-89, reaffirms Lord Hardwicke's opinion in *Huggonson's Case* and says in part (p. 88):

> "It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place, but it certainly is not confined to such cases. We further think that, if the articles are in the opinion of the jury calculated to interfere with the course of justice or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: see Reg. v. Grant. (1) We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted can have no weight in the decision of the question now before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting, either wholly or in part, from the influence upon the minds of the jurors at the trial of such articles as these justifies

> their publication. This is an argument which we need scarcely say reduces the position almost to an absurdity, and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. A person accused of crime in this country can properly be convicted in a Court of Justice only upon evidence which is legally admissible and which is adduced at his trial in legal form and shape. Though the accused be really guilty of the offence charged against him; the due course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilty or innocence with minds into which prejudice has been instilled by published assertions of his guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence."

In deciding that the fact of actual influence or obstruction is immaterial, the court reaffirmed the doctrine of *Charlton's Case*, 2 My. & Cr. 342, 40 Eng. Rep. 671 (1837), and *Skipworth's Case*, L. R., 9 Q. B. 230, 235-238 (1873).

*Oswald on "Contempt of Court,"* an English work, says at page 6:

> "To speak generally, contempt of court may be said to be constituted by any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant or their witnesses during the litigation"

And at page 92:

> "Generally, comments on a cause, written and published, spoken or threatened, while it is pending, and prejudicing, or calculated to prejudice, any party, and

particularly paragraphs in newspapers having that effect are contempts: but speeches or sermons are equally liable to be punished."[10]

At page 93:

"The question in every case is not whether the publication in fact interferes, but whether it tends to interfere, with the due course of justice."[11]

So much for the English law. The *Respublica case*[12] was decided in 1788; it marked out the pathway which has been constantly followed in the Federal Courts (except as temporarily influenced by the Statute of 1831, which has been codified as 28 U.S.C.A., Sec. 385) and in the courts of the various states.[13] It announced and applied the reasonable tendency test (pp. 326 or 159) which was later so ably stated by Mr. Justice Holmes in *Patterson v. Colorado* as follows:

"In the next place, the rule applied to criminal libels applies yet more clearly to contempts. A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. *The theory of our system is that the conclusions to be reached in a case will be induced only by evidence*

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[10] The author here cites a long list of English decisions starting with *Huggonson's Case*.

[11] Citing English cases.

[12] 1 Dall. 319, 1 L. Ed. 155.

[13] Except petitioners' case of *State v. American News Co.*, 64 S. D. 385, which is distinctly contrary to the great weight of authority

*and argument in open court, and not by any outside influence, whether of private talk or public print.*

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there is a jury, and the publication may affect their judgment. Judges generally perhaps are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, *as tending toward such an interference*, it may punish it as in the instance put. When a case is finished courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."[14]

*Amicus curiae* Hanson is mistaken in this statement: "Moreover, in *Near v. Minnesota, supra*, this Court consigned to oblivion the Blackstonian theory adopted by Mr. Justice Holmes in the *Patterson* case that freedom of the press does not comprehend immunity from subsequent punishment for harmless publications" (Br. p. 15). Mr. Justice Holmes never embraced any such doctrine. This appears from the portion of the *Patterson* opinion just quoted, and Mr. Justice Holmes conceded the probability of interference by this court whenever the record shows "that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment" (p. 461). He condemned as abuse of liberty publications "tending toward such an interference" with pending proceedings and

[14] 205 U. S. at 462

adhered to this view when joining in the opinion in *Sinclair v. United States*, 279 U. S. 749. The Holmes doctrine is the same as that of the *Near* opinion which, at page 720, said:

> "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."

The doctrine of the *Patterson* case was adopted and applied by the court in *Toledo Newspaper Co. v. United States*,[15] wherein it was said:

> "True, it is urged that although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the circumstances which we have stated, in a daily newspaper having a large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is *controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject.* Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications, and therefore there was no proof tending to show the wrong complained of. But here again, not the influence upon the mind of the particular judge is the criterion, *but*

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[15] 247 U. S. at 421. Mr. Justice Holmes, who dissented in this case, did not question this as the common law; he concerned himself with the proper construction of the 1831 statute and its successors and did not bring forth his clear and present danger doctrine until he spoke for the court in *Schenck v. U. S.*, 249 U. S. 47, which was decided at the following term and was not a contempt proceeding.

*the reasonable tendency of the acts done to influence or bring about the baleful result is the test.* In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice, and to the evil to come from its obstruction, *the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case* The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."[16]

This language was reiterated and applied in *Sinclair v. United States*, 279 U. S. at 763-4,[17] and by the California Supreme Court in *Matter of Bridges*, No. 19 [R. 157].

And this has been the law of the State of California at all times. There has been no contrary pronouncement. For an early case which voiced this view, see *Matter of Tyler*, 64 Cal. 434, 438.

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[16]Criticisms have been aimed at this opinion in Frankfurter and Landis' "Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts", 37 Harv. L. R. 1010, and Nelles and King's "Contempt by Publication", 28 Col. L. R. 401, both of which are cited by petitioners. But these commentaries are concerned with the procedural aspects of the decision. Neither treatise challenges the soundness of the reasonable tendency rule except as the authors conceive it to have been impaired for Federal Court purposes by the Statute of 1831. In fact, Mr. Hanson quotes the authors as recognizing that "the courts must be 'invested with incidental powers of self-protection'." (Hanson's Br. p. 23.)

[17]And see: *United States v. Sanders*, 290 Fed. 428, 432 (D.C. W.D. Tenn.); *United States v. Sullens*, 36 Fed. (2d) 230, 237-8 (D.C. Miss.); *In re Independent Publishing Co.*, 240 Fed. 849 (9th C.C.A.); *Francis v. People*, 11 Fed. (2d) 860, 865 (3rd C.C.A.); *Froelich v. United States*, 33 Fed. (2d) 660, 663 (8th C.C.A.); 6 *R. C. L.*, Sec. 21, p. 509; 13 *C. J.*, Sec. 44, p. 34; 17 *C. J. S.*, Sec. 30, p. 41.

The Supreme Court in the *Bridges* case said, with respect to the "clear and present danger" and similarly phrased tests:

> "It is sufficient to say in answer to petitioner's contention that none of these tests has been applied by the courts of this state, and that neither the Patterson nor the Sinclair case, which are in accord with the decisions of the courts of this state, has been overruled by the court in which they were rendered. We are, therefore, content to rest our decision upon the 'reasonable tendency' test in determining whether the publication or act done constituted a contempt of court." [No. 19, R. 158.]

Discussing the claim that the courts have no inherent power to deal with constructive contempt, the court said in the same case:

> "On the other hand, he (petitioner) concedes that the rule of law enunciated in our former decisions, and reaffirmed so positively and definitely in the San Francisco Chronicle case, and other recent cases, is now and for years past has been the law in the state respecting publication of articles contemptuous in their character, even though not made in the presence of the court." [R. 148.]

And:

> "From the foregoing it will appear that the overwhelming weight of authority in this country supports the decision of this state rendered in the San Francisco Chronicle case, and those cited in that opinion." [R. 151.]

These doctrines were incorporated at bar [R. 122].

Petitioners should be able to advance some overwhelming reason as a basis for urging this court to reverse itself and then impose its new concept upon the State of California as the only permissible avenue for protecting the independence of its local courts. Indeed, they should be able to furnish an affirmative answer to the query whether their "present danger" doctrine,

> "Is * * * a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" (*Twining v. New Jersey*, 211 U. S. at 106).

But no such controlling reason is disclosed. It is conceded inferentially that this new standard of clear and present danger has never found its way into the law of contempt.

Counsel for petitioners, wanting more persuasive reason, merely urge that the clear and present danger doctrine *should be* now incorporated into the contempt law[18] because, so they assert, reasonable tendency (which has been found a workable standard in England and the United States for the past two hundred years) is too vague to comply with the requirements of due process, whereas "clear and present danger" possesses all of the necessary elements of certainty.

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[18]Counsel are in error when they say (Br. p. 10): "This doctrine ('clear and present danger') was first adopted by a majority of this court in Herndon v. Lowry, 301 U. S. 242, 256." Mr. Justice Holmes spoke for the court in *Schenck v. United States*, 249 U. S. 52, and there announced and applied the doctrine in the year 1918. But that learned jurist and Mr. Justice Brandeis in 1929 joined in the reiteration and application of the reasonable tendency test to the Sinclair contempt.

"A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted." (*Railroad Com. v. Rowan & Nichols Oil Co.*, 84 L. Ed. (Adv. Op.) at 985.)

"Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations" (*Twining v. New Jersey*, 211 U. S. at 106-7.)

**The Danger Doctrine Is Not Essentially Different From the Reasonable Tendency Rule.**

We showed in our former brief that the doctrines are essentially one (pp. 42-47); that the protagonists of the proffered standard cannot define it in terms of contempt so as to exclude the tendency concept (pp. 43-44); and that each test presents in its application a question of fact depending for solution upon determining a matter of degree (pp. 44-47)—degree of tendency to interfere or of danger of interference.

Petitioners' latest brief says, of the application of clear and present danger to contempt, that "All that need appear is that an immediate and serious interference with a court proceeding * * * was to be expected" (p. 16). It has been repeatedly held that a publication tending to influence a pending proceeding is an interference with it. In that sense, petitioners would substitute danger of interference for the accomplished fact. But we apprehend that

counsel do not mean that. What they really mean is that the tendency to interfere should be so "immediate and serious" that success in influencing the proceeding "was to be expected". In other words, as they now define it, their rule merely calls for a clearer case of tendency,—for a difference in degree.

But when it is remembered that a conviction can be had only upon evidence convincing the trial judge beyond reasonable doubt [No. 19, R. 47; *Hotaling v. Superior Court*, 191 Cal. 501, 505] of the obstructive quality of the publication, this difference in degree or danger hardly suffices to upset the common law of centuries past or to impel a declaration by this court that its application to petitioners is a denial of due process.

An analysis of the decisions discloses that the authors of the danger rule conceived no difference between it and reasonable tendency; that there was immanent in their exposition of the doctrine a recognition of the fact that a reasonable or inherent tendency to accomplish a harmful result presents a present danger thereof.

When the doctrine was first announced by Mr. Justice Holmes in the *Schenck* case,[18a] the court held that the standard had been met by a document which would reasonably be expected to influence persons subject to the draft. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be *expected to have* upon persons subject to the draft *except to influence them* to obstruct the carrying of it out" [p. 51]. This was in response to this contention: "But it is said, suppose that that was the

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[18a]249 U. S. 52.

*tendency* of this circular, it is protected by the 1st Amendment to the Constitution" [p. 51]. Explaining that "It is a question of proximity and degree," the learned jurist found that the tendency of the document was enough to meet the danger test and in that connection specifically rejected the actual obstruction criterion [p. 52].

In *Frohwerk v. United States*, 249 U. S. 204, an espionage case dealing with newspaper publishers, Mr. Justice Holmes again applied the danger doctrine, saying at page 209:

> "But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame, and that the fact was known and relied upon by those who sent the paper out;"

and held the tendency in the particular circumstances to be enough.

*Debs v. United States*, 249 U. S. 211, held that the present danger standard had been met, Mr. Justice Holmes saying in part at page 216:

> "Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words *tending to obstruct* the recruiting service, he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their *natural tendency and reasonably probable effect* to obstruct the recruiting service, etc., and unless the defendant had the specific intent to do so in his mind."

In *Schaefer v. United States*, 251 U. S. 466, another newspaper espionage publication case, the court, speaking through Mr. Justice McKenna, referred to the *Schenck* case as affording the proper criterion of guilt and, concerning its application to the publications in question, said at page 479:

> "Their effect on the persons affected could not be shown, nor was it necessary. The *tendency of the articles* and their efficacy were enough for offense, —their 'intent' and 'attempt,' for those are the words of the law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny."

In *Pierce v. United States*, 252 U. S. 239, plaintiff in error contended that "there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act" (p. 243). Concerning the pleadings the court, through Mr. Justice Pitney, said:

> "Whether the statements contained in the pamphlet had a *natural tendency* to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer, but by the jury at the trial. There was no error in overruling the demurrer." (p. 244.)

And:

> "If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have *a tendency to cause* insubordination, disloyalty, and refusal of duty in the

military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged." (p. 249.)

*Gitlow v. New York*, 268 U. S. 652, says at page 667:

> "That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, *tending* to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."

And at page 671, citing the *Schenck* case as authority for the rule, said:

> "In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if *its natural tendency and probable effect* were to bring about the substantive evil which the legislative body might prevent."

Incidentally this case, like the *Schenck*, rejected the "actual obstruction" contention. "There was no evidence of any effect resulting from the publication and circulation of the Manifesto" (p. 656).

> "And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or

> unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration." (p. 669.)

Dissenting in *Whitney v. California*, 274 U. S. 357, Mr. Justice Brandeis said at page 376:

> "To justify suppression of free speech there must be *reasonable ground to fear* that serious evil will result if free speech is practiced. There must be *reasonable ground to believe* that the danger apprehended is imminent."

None of the later cases throws any doubt upon the substantial identity of the reasonable tendency and the present danger tests.

**Petitioners' Latest Differentiation Between Danger and Tendency.**

And so petitioners suggest a superior virtue in the danger doctrine growing out of its "objective" nature (Br. p. 22), as opposed to the "subjective" character of the tendency test. Counsel apparently mean that the judge, in the one case, reaches his conclusion upon a consideration of proved facts and, in the other, draws it out of his own consciousness. The view finds no support in the authorities. The *Toledo* and *Sinclair* cases say:

> "But the situation is controlled by the reasonable tendencies of the acts done, and not by extreme and substantially impossible assumptions on the subject." (247 U. S. at 421, and 279 U. S. at 764.)

Quite obviously the rule does not permit of any "presumed tendency", such as petitioners suggest.

Opposing counsel are somewhat inconsistent in this matter, for, in discussing the sufficiency of the evidence to support the conviction under the reasonable tendency rule (Point 2, p. 23, *et seq.*), they invoke such considerations as these: a "construction of the language of the editorials" (p. 23); a fair interpretation "in the light of existing local conditions and the well-known views of the Times upon labor disputes" (p. 27); the Chandler affidavit setting forth "at length the policy of the Times toward labor violence and the sit-down strike" (p. 24),[19] its past expressions on the subject "on numerous occasions during the past fifty years" (p. 24); the asserted "established practice to invite opinion in probation matters" (p. 29); the casual statement of an unnamed presiding judge advising "the Times that its objection should have been made known while the application for probation was pending" (p. 29); the conduct of the District Attorney in writing "a judge respecting the penalty to be imposed on an applicant for probation" (p. 29); the more practical method of influencing the court "by a clandestine approach to the judge through a probation officer than by a frank editorial in public print" (p. 30); the purpose of the editorials in general "to advance the opinion of the editor to his reading public, and to impress upon the public the importance of the matter under discussion" (p. 30), *i. e.*, the pending legal question; the want of merit of the application for probation in point of law (p. 31); the fact that the editorial was but "the expression of the opinion of the

[19]It was not stipulated that the Chandler affidavit is true; it was merely stipulated that it be received as evidence [R. 80]; the Supreme Court was mistaken in saying [R. 134] that same was stipulated to be true.

Times upon an industrial and social matter of consequence" (p. 32); the claim that "Probation for Gorillas" "did not constitute vilification" (p. 32); that "The Fall of an Ex-Queen" was couched in "mild and temperate language" (p. 6); that the editorials approved (p. 4) and "did not assail or comment unfavorably upon the courts or any judge thereof"[20] (p. 6); the Times' "inflexible opposition to the closed shop and the sit-down strike" as a well known fact (p. 4); the absence of any specific evidence "that any of the editorials came to the attention of any of the judges before whom the related matters were pending", or that "any trial judge felt that he was influenced or embarrassed because of any of them", or that "any of the defendants in the related cases suggested or complained that any prejudice resulted to them because of the editorials"; and the absence of "any showing of an intent on the part of petitioners to influence or embarrass the proceedings in the related cases" (p. 7); the fact that each editorial followed the verdict (pp. 4-5).

Turning to the considerations which, according to petitioners, should enter into an "objective" conclusion, we find them to be these: "the circumstances under which the utterance is made, its tenor, the temper of the times, the past conduct of the speaker relative to matters of similar

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[20]Nelles and King in 28 Col. L. R. (cited by petitioners), have this to say in footnote 92 on page 547: "Friendly backing is obviously more likely than hostile aspersion to influence a judge. It is easier to close a mind than to open one. To fortify a judge in his prepossessions tends to close his mind and so impede his proper discharge of judicial function. This possibility seems never to have occurred to judicial consciousness. One court has actually observed, as if it tended to show the obstructive character of a publication, that it clearly was not written 'for a purpose laudatory to the court, or to bring it into higher repute than it was'."

import, and whether the utterance ever came to the attention of the court" (p. 22). It so happens that all these things were taken into consideration in arriving at a conviction at bar. The circumstances of the utterances were set forth in the charging papers and elaborated by the Chandler affidavit which was received in evidence [found at R. 42-52; summarized at pp. 13-14, 16-17, of our former brief]. The tenor of each editorial has been at all times one of the major subjects of debate. The temper of the times is certainly disclosed by the Chandler affidavit. The absence of any showing that the utterance ever came to the attention of the specific judge was taken into consideration by Judge Wilson and the Supreme Court [R. 104, 118, 127], and properly so according to the rule of the *Toledo* case (247 U. S. at 421).

So far as concerns "the past conduct of the speaker relative to matters of similar import" or "the temper of The Times", the Supreme Court adopted and took into consideration the Times' own picture of itself as "such an influential paper" [R. 128], and it might well have taken judicial notice, as it was invited to do, of the case of *Otis v. Superior Court,* 148 Cal. 129, wherein the executive officers of the Times-Mirror Company were relieved of a contempt conviction upon the ground that they had not been charged in proper language, notwithstanding the court's observation that "No very serious attempt is made by counsel to combat the careful and able opinion of the respondent in support of his conclusion that the articles in question did constitute a contempt * * *" (p. 130). Also the Supreme Court might well have taken judicial notice of the caustic nature of displeasure of the Los Angeles Times, a matter of common knowledge; its

lack of restraint in dealing with those of whom it disapproves is evidenced by the records of that court, as witness:

*Tingley v. Times-Mirror Co.*, 151 Cal. 1;
*Scott v. Times-Mirror Co.*, 181 Cal. 345;
*Newby v. Times-Mirror Co.*, 46 Cal. App. 110;
*Earl v. Times-Mirror Co.*, 185 Cal. 165.

The Supreme Court's discussion of the various editorials shows that all of petitioners' constituents of an "objective conclusion" were considered by it. And the actual result was a finding that there had been such successful obstruction of the pending causes that "the detriment caused by the publication of said editorials was *the probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials"[21] [R. 138]. And it is not to be forgotten that there was a virtual confession of guilt upon the count relating to "Probation for Gorillas" (see our former brief, pp. 5-7).

But if there be any discernible and substantial difference between the two doctrines—tendency to influence and danger of influence—it becomes apparent that the latter rule is not susceptible of application to contempt; that its field for operation is political and economic discussion.

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[21]That court has just held (Sept. 21, 1940) that the evidence failed to show commission of the crime of which the Werners were convicted. See 100 Cal. Dec. 281.

## II.

## As Now Defined by This Court the Present Danger Doctrine Is Inherently Inapplicable to Contempt.

Petitioners' counsel concede that "interference with one judge or one judicial proceeding" (p. 16) is a "substantive evil which the state constitutionally may seek to prevent"[22] and hence "within the allowable area of state control."[23] Indeed, they go further and state that under their conception of the present danger doctrine "All that need appear is that an immediate and serious interference with a court proceeding * * * was to be expected." As we have shown, however, this is really the tendency doctrine, not the clear and present danger rule which was enunciated by Justices Holmes and Brandeis.

The *rationale* of the *Thornhill* decision[24] forbids application of this standard to contempt of court (even if the proper criterion were not wholly within the exclusive area of state control). The opinion carefully limits the scope of free speech and freedom of the press to the fields of political and economic discussion and shows that historically and *ex necessitate* free discussion up to the danger point cannot apply to pending litigation,—this for the basic reason previously stated by Mr. Justice Holmes:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evi-

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[22]Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 373.

[23]*Carlson v. State of California*, 310 U. S. at 113.

[24]310 U. S. 88.

dence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with respect to a court."[25]

Mr. Justice Murphy said at page 95 of the *Thornhill* decision:

"Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

Clearly the correction of error in court proceedings is the province of the appellate tribunals,—not the newspaper, the labor leader, the radio orator or the mob,—not any of the other "processes of popular government".

The real object of this freedom, as stated by the Continental Congress, is set forth at page 102 as follows:

"The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of

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[25]*Patterson v. Colorado*, 205 U. S. at 462.

> thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."

Can it be that this was intended to refer to the courts? That their deliberations are to be "shamed or intimidated, into more honourable and just modes of conducting affairs"? Petitioners have not had the temerity to embrace that doctrine. Judge Wilson thus stated the obvious truths:

> "The judicial department of the government is not on a parity with its coordinate branches. The legislator and the executive may receive petitions and advice from their constituents, they may express their opinions upon any subject at any time, yet they are not disqualified from acting. This freedom is forbidden ground to the judge. To learn any facts concerning a case, to discuss its merits, to hear any argument except in open court, or to express an opinion before hearing the evidence, is to disqualify him. Neither may he go upon the public rostrum, give interviews to the newspapers, or circularize the public, in explanation or in defense of his judicial acts. The reason for his decisions must appear from the decisions themselves." [R. 104.]

The *Thornhill* opinion further says at page 102:

> "Freedom of discussion, if it would fulfill its historic function in this nation must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Is this not satisfied, as to pending litigation, by discussion after the ruling is made, by the right of recall, or refusal to reelect? It should be remembered that discussion is not necessarily deferred until the entire cause is ended: that it is improper only as to pending matters (see ruling as to count one of the *Shuler* case, 210 Cal. at 387, and authorities cited at p. 41, *infra*); and that the courts found in each instance at bar that the wrong consisted in influencing not the verdict but the ensuing matter which the trial judge was about to determine judicially.

Mr. Justice Murphy said in the *Thornhill* opinion (p. 104):

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Never in our history until Mr. Justice Edmonds and Mr. Justice Gibson suggested it has it been thought that judicial deliberation must abide (or be subject to) the test of its merits "by competition for acceptance in the market of public opinion."[26]

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[26]Neither *State v. American-News Co.*, 64 S. D. 385, nor *Nixon v. State*, 207 Ind. 426, goes so far. The *Nixon* case related to a past matter, like count one of the *Shuler* case, and the court did not reject the tendency doctrine. The *American-News Co.* case exhibits judicial palsy in the face of the power of the press. The court exonerated the defendants although it said at page 400: "The defendants by their series of publications attempted to arrogate unto themselves the administration of justice in regard to all these cases. It is unfortunate for any community when this occurs." But more unfortunate for the State of South Dakota when its Supreme Court exhibited so little courage as to exonerate the defendants from the clearly established charge of contempt with the confession that "very possibly we do" err.

Referring to such cases as *Thornhill, Herndon, Hague* and *Schneider* (and naming part of them), Mr. Justice Frankfurter said in the *Minersville School District* case (footnote 6 on p. 998): "the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function",—thus clearly differentiating them from contempt proceedings. For the processes of popular rule were never intended to "effectively function" through direct application to judicial deliberations of a judge concerned with a pending matter. They—the processes of popular rule—are given full scope through the indubitable right to criticize any closed matter; to join as friends of the court (*e. g.*, American Civil Liberties Union and American Newspaper Publishers Association at bar) in seeking a reversal; to recall the judge; to refuse to reelect him; to bring about his impeachment or his removal from office by legislative action (see Cal. Const., Art VI, Sec. 10).

## III.

## Reasonable Tendency to Interfere With a Pending Court Proceeding Is a Long Established Common Law Standard Which Does Not Lack Requisite Certainty.

We have, in discussing *Herndon v. Lowry*[27] in our former brief (pp. 48-52), pointed out the basic difference between a new and vague statutory measure of guilt, one not confined to "a described and defined activity of the Government", on the one hand, and a well settled common law standard "notwithstanding an element of degree in the definition as to which estimates might differ", on the other.[27a] We also have shown the antiquity and uniformity of the reasonable tendency test. Its successful administration for some two hundred years or more renders presently applicable the remark of Mr. Justice Holmes, who said in *International Harvester Co. v. Kentucky*, 234 U. S. 216, at 223:

> "The conditions are as permanent as anything human, and a great body of precedents on the civil side, coupled with familiar practice, make it comparatively easy for common sense to keep to what is safe."

But opposing counsel have not met this point directly nor attempted to differentiate the authorities upon which it rests. Obliquely they assert the *Cantwell* decision to be at variance with those cases and to have impliedly overruled them, although none of them is there mentioned.

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[27] 301 U. S. 242.

[27a] As to this well settled distinction, see also 16 *C. J.*, Sec. 28, pp. 67-68; 22 *C. J. S.*, Sec. 24a, pp. 70-73.

***Cantwell v. Connecticut* Is Not Opposed to Respondent's Position.**

The *Cantwell* decision is not, as contended by petitioners, at variance with these cases.[28] The fifth count, under which petitioner Jesse Cantwell was convicted, charged, as shown by the report in 8 Atl. (2d) 535 (126 Conn. 1), that petitioner "did disturb the public tranquility by certain acts or conduct inciting to violence or tending to provoke or excite others * * * to break the peace"; and the state court held that "The fifth count charges a breach of the peace by acts which are within the common-law definition of that offense" (p. 536); but this tribunal held the contrary, saying at page 309:

> "One may, however, be guilty of the offense if he commit acts or make statements *likely to provoke* violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. * * *
>
> "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion."

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[28] *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 92; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 459; *Fox v. Washington*, 236 U. S. 273.

And hence the court further concluded that petitioner had been convicted "on a common law concept of the most general and undefined nature" (p. 308), a mistaken concept. The opinion impliedly concedes that the common law offense of breach of the peace, correctly understood and applied, would be a sufficiently definite standard of guilt.

**Authorities Such as Herndon v. Lowry Do Not Support Petitioner's Contention.**

We have discussed that case[28a] at pages 48-52 of our former brief, but counsel supporting petitioners lay so much stress upon it that it seems necessary to more clearly indicate its proper place in the jurisprudence of free speech.

None of the cases so far decided rejects "reasonable tendency" to accomplish a harmful result where that test has been prescribed by the legislature. Cases which seem to reject it in the field of political and economic affairs do so only as counsel attempt to engraft that criterion upon otherwise vague standards not permitting of that construction. As we pointed out in our former brief, that is manifestly true of the *Herndon* decision. That opinion *ex industria* makes it clear that the court was not dealing with a canon of conduct expressed with reasonable certainty and reflecting a legislative determination that such conduct is harmful because of its dangerous tendency. At page 260 it is said:

> "It is to be borne in mind that the Legislature of Georgia has not made membership in the Communist

[28a] 301 U. S. 242.

> Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare."

This was by way of emphasis of what had previously been said concerning the *Gitlow* case:

> "It relies particularly upon Gitlow v. New York, 268 U. S. 652, 69 L. ed. 1138, 45 S. Ct. 625. There, however, we dealt with a statute which, quite unlike §56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described." (p. 256.)

And, quoting that case:

> "'* * * when the legislative body had determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.'" (p. 257.)

The trouble with the Georgia statute was that it neither reflected a common law standard nor any other rule of action sufficiently definite to serve as a standard. But the inference is irresistible that had the legislature written into the statute some common law criterion, it would have been upheld.

The contempt rule of reasonable tendency which came to us as a part of our basic jurisprudence stands on a parity with the legislative declaration of a standard of misconduct. In effect the rule declares that the proscribed utterances, because of their tendency "to obstruct a described and defined activity of the government" (*Herndon*, p. 256)—the functioning of the courts—present a present danger of a "substantive evil which the state constitutionally may seek to prevent," one "within the allowable area of state control." Like the *Herndon* case, the *Minersville School District* decision draws attention to the higher authority of rules of conduct which constitute "manifestations of specific powers of government deemed by the Legislature essential to secure and maintain * * * orderly, tranquil, and free society."[28b] The *Erie Railroad* case (304 U. S. 64) establishes that it makes no difference whether the state has spoken through its legislature or its common law if it has spoken with sufficient certainty.

A survey of the rulings of this court will show that the danger doctrine has not operated in any single instance to strike down a reasonable tendency standard prescribed by the legislature. In none of the cases where it was declared or applied was any statutory (or any common law) standard of reasonable tendency involved.

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[28b]84 L. Ed. (Adv. Op.) at 996.

**Comparative Certainty of the Tendency and Danger Tests.**

Final proof of the fatal uncertainty in the reasonable tendency test is to be found, petitioners say, in the divergent views held by the Bar Association Committee, the trial judge and the Supreme Court concerning the Times editorials. The present danger test affords no ground for any such difference of opinion, so the argument proceeds. It can best be appraised by scrutinizing the history of the application of this test to specific factual situations. And the record shows that in most instances where this court has applied it the justices have been unable to agree; there have been dissents as to the sufficiency of the evidence to meet this standard. In *Abrams v. United States,* 250 U. S. 616, there were two dissents; in *Schaefer v. United States,* 251 U. S. 466, three dissents; in *Pierce v. United States,* 252 U. S. 239, two dissents; in *Gilbert v. Minn.,* 254 U. S. 325, one dissent; in *Gitlow v. New York,* 268 U. S. 652, two dissents; in *Herndon v. Lowry,* 301 U. S. 242, four dissents; in *Thornhill v. Alabama,* 310 U. S. 88, *Carlson v. California,* 310 U. S. 106, and *Schneider v. State,* 308 U. S. 147, there was a dissent; and in *Hague v. Committee for Industrial Organization,* 307 U. S. 496, the justices of this court delivered three separate opinions in support of the ruling, being unable to fully agree upon the grounds therefor, while two of the justices dissented. If the present danger rule is so clear and precise as petitioners contend, it would seem that the members of this august tribunal would be able to agree more readily upon its proper application to varying sets of facts.

**"The Brooding Omnipresence of Fear."**

The argument that, because of vagueness in the definition, "so uncertain will be the average citizen whether his utterance may have a 'reasonable tendency' to interfere with the orderly administration of justice, that, impelled by the apprehension of criminal prosecution, he will remain silent despite his constitutional right of freedom of discussion" (Petnrs. Br. p. 19) is interesting when advanced by this petitioner after its fifty year fight for the open shop "at great cost to itself in the lives of employees and in property damage", doing "everything in its power to establish and to maintain the open shop principle", making it "a leader of community thought and action in matters wherein the welfare of such relations is involved" [Chandler Affidavit, R. 44]; and especially after the experience of its executive officers in *Otis v. Superior Court, supra,* and the reiteration of the doctrine in the widely publicized *Shuler* Case, 210 Cal. 377. The present publications, particularly "Probation for Gorillas", are sufficient proof that the common law standard is not such as to frighten petitioners from free expression of their views or to discourage them from years of litigation in the hope of a successful termination as in the *Otis* case, —no "brooding omnipresence of fear", as suggested in the Hanson brief (p. 12).

**Petitioners' Misplaced Argument as to Finality.**

Petitioners further attack the reasonable tendency rule upon the ground that it defers all discussion of court proceedings until complete finality in the court of last resort (Br. pp. 20-21) and until the matter of comment has become stale and no longer newsworthy,—"until every conceivable legal procedure in connection therewith has been exhausted" (quoting Hanson Brief, p. 22). The argument overlooks the authoritative ruling of this court that the duration of the pendency of an action for contempt purposes is exclusively a question of state law (*Patterson v. Colorado*, 205 U. S. at 460) and the rule is no longer open to discussion as claimed by *amicus curiae* Hanson at page 21. But petitioners' criticism would possess no substance if the matter were to be now reexamined on its merits.

To begin with, the rule has no relation to substantially true news accounts published at any stage of the proceeding,[29] news accounts as distinguished from discussion of the merits. In the second place, the desire to publish comment does not prove or create the right to do so. The publisher must await finality of the particular matter because he must refrain from injecting extraneous influences into the judicial deliberations. Neither he nor his reader is entitled to debate with the judge the merits of a matter *sub judice*.

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[29] *In re Shortridge*, 99 Cal. 526.

Counsel's illustrations on brief page 21 are interesting because so far fetched. They say that finality of a murder conviction occurs only with defendant's execution because forsooth a writ *coram nobis* may lie. Such extreme arguments defeat their own purpose.

Finality is requisite, but it is finality of the matter under discussion.[30] So held as to the first count of the *Shuler* case in 210 Cal. at 387.[31] But it was likewise there held that the finality of that first phase of the cause did not warrant the discussions mentioned in the second and third counts and which related to approaching judicial action on other phases of the case. So at bar, petitioners were not convicted because of the relation of their publications to the verdicts mentioned; it was because of the potential influence upon phases of the case which were still pending and which would require early action by the judge [see R. 124-5, 128, 130, 132-3].

Reasonable tendency is a realistic test. It applies to publications which are so timed and circumstanced as to possess sufficient momentum to invade the judicial chambers.

The Los Angeles Times, through its localized circulation, lacks potentiality to interfere with the deliberations of the Supreme Court of the United States. And while

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[30]See: 6 *R. C. L.*, Sec. 25, p. 512; 17 *C. J. S.*, Sec. 30b, p. 44; 12 *Am. Jur.*, Sec. 31, p. 413; *In re Independent Publishing Co.*, 240 Fed. 849, 853-4 (9th C.C.A.).

[31]*Cf. Van Dyke v. Super. Ct.*, 24 Ariz. 508, 541.

an issue of the San Francisco Chronicle possesses sufficient momentum to reach the Supreme Court in San Francisco (1 Cal. (2d) 630), the same article, appearing in an inconspicuous country newspaper, would not have had the requisite reasonable tendency to disrupt the judicial calm.

The short of it is that "reasonable tendency" must be determined with reference to the particular facts. What would interfere with the deliberations of the Superior Court of Los Angeles County might not be calculated to come to the attention of this court, or *vice versa*. What would be a contempt of one court might not be an offense against the other. Though relating to a different stage of the same cause, the question of reasonable tendency must be solved with reference to the nature and place of the utterance and its inherent momentum.

So the *coram nobis* argument is misplaced and reflects only a distorted viewpoint of petitioners. It takes us into the realm of "extreme and substantially impossible assumptions on the subject" which have been carefully excluded in defining the limits of the reasonable tendency standard.

**Petitioners Seek Special Immunity, Not Equal Protection of the Laws.**

Counsel for petitioners tacitly concede the decision in *Sinclair v. United States*, 279 U. S. 749, to be sound in relation to its facts. In that case the reasonable tendency doctrine was reannounced and applied. Petitioners seek to differentiate it upon the factual basis that "it was not

a free speech case". Reasonable tendency thus becomes a sufficiently definite standard for determination of contempts other than publications or speech. So far as vagueness is concerned, the standard is as definite in one instance as the other.

Petitioners do not seek equal protection of the laws. They invoke different standards for different classes of people. In arguing for this differentiation between classes of contempt cases, counsel have repeated the error of the Associated Press in its effort to avoid the application of the National Labor Relations Act, for especial immunity is sought on behalf of the publisher. Concerning this attitude, Mr. Justice Roberts said in *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 133:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court."

**The "Actual Obstruction" Principle.**

Mr. Wirin in his *amicus curiae* brief herein advocates adoption of the test of actual obstruction. And the matter is therefore discussed at pages 53-56 of our former brief. But counsel for petitioners in this cause have not embraced that contention; they have waived it, and we therefore discuss the matter no further in this brief. If it becomes of interest here, our views will be found in the brief filed contemporaneously herewith in the *Bridges* case.

## IV.

### This Proceeding Presents No Federal Question.

The matter is discussed at pages 31-38 of our former brief.

It is there shown that the definition of lawful or unlawful conduct, the establishment and maintenance of independent courts, are within the exclusive keeping of the states,[32] pertaining to their internal sovereignty,—subject only to the requirements of due process and equal protection of the laws.

*Twining v. New Jersey*, 211 U. S. 78, 106:

> "In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in Hurtado v. California, 110 U. S. 516, 527, 28 L. ed. 232, 235, 4 Sup. Ct. Rep. 111, 292."

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[32]See, also, *Ex parte Converse*, 137 U. S. 624, 631-2.

That due process in the procedural sense was afforded petitioners is amply disclosed by the facts reviewed at pages 1-6 of our former brief and the authorities cited at pages 34-38.

That there was uniform application of the law appears from comparison of the *Times* case with the *Bridges* proceeding, as well as the *Chronicle*, *Shuler*, *Shortridge* and other cases cited by the Supreme Court [see R. 122 and No. 19, R. 147, 156].

**The Common Law of Two Hundred Years Duration Cannot Be a Denial of Due Process.**

But counsel would create a constitutional question out of asserted error in the rule which has prevailed for two hundred years, forgetting that "no constitutional rights can be based on the error of prior decisions";[33] also forgetting that the fourteenth "amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."[34] Indeed, the very antiquity of the reasonable tendency rule establishes its harmony with due process.

What Mr. Justice Frankfurter said about legislation and religious liberty is equally applicable here:

> "Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic war-

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[33] *Dunbar v. New York*, 251 U. S. 516, 519.

[34] *Minor v. Happersett*, 88 U. S. 162, 171.

> rant.[35] * * * Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom." (Minersville School Dist. v. Gobitis, 84 L. Ed. (Adv. Op.) at 995-6.)

Mr. Justice Holmes, deciding a party wall controversy under the laws of Pennsylvania,[36] referred to the fact "that the custom of party walls was introduced by the first settlers in Philadelphia under William Penn, and has prevailed in the state ever since" (p. 30), and held:

> "The 14th Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U. S. 94, 104, 112, 65 L. ed. 837, 843, 846, 17 A. L. R. 873, 41 Sup. Ct. Rep. 433" (p. 31).

The cited case of *Ownbey v. Morgan* dealt with the Delaware attachment statutes. Concerning the matter now in hand, the opinion said:[37]

> "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, * * *.

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[35]It is immaterial, of course, whether the state has spoken through its Legislature or its courts defining the common law. See quotations from *Erie R. Co. v. Tompkins*, 304 U. S. 64, at pages 32-33 of respondent's initial brief herein.

[36]*Jackman v. Rosenbaum Co.*, 260 U. S. 22.

[37]256 U. S. at 111-12.

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the 14th Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform. For instance, it does not constrain the states to accept particular modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to make amendments. Neither does it, as we think, require a state to relieve the hardship of an ancient and familiar method of procedure by dispensing with the exaction of special security from an appearing defendant in foreign attachment."

Nor does the 14th Amendment contain any mandate for the rejection of a time-honored criterion of contempt and substitution of a new and putatively better one.

**Large Implications of Recognition of Federal Question Here.**

The result of a holding that the case presents a Federal question would be fraught with large consequences. We assert that the determination of the rules necessary to preserve the independence of the California state courts is solely within state competency; that no supervisory power rests in any branch of the Federal Government; and that substitution of a new rule for the state courts would constitute a serious impairment of the autonomy of the state; "whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union" (*Twining v. New Jersey*, 211 U. S. at 92).

The California Supreme Court has declared that "Every court is the exclusive judge of its own contempts" (*Otis v. Superior Court*, 148 Cal. at 130) and this court that "this is no technical rule," for "To submit the question of disobedience to another tribunal, be it jury or another court, would operate to deprive the proceeding of half its efficiency" (*Re Debs*, 158 U. S. at 595).

If the rule of the *Patterson, Toledo, Sinclair* and similar cases is now to be abandoned, if the cogency of the evidence supporting state convictions is to be here reviewed—three thousand miles from the place of the contempt—then indeed are the state courts rendered impotent. Few courts have the aid of Bar Associations willing or financially able to sustain the burden of supporting for two or three years, and to the highest court in the land, their judgments. If contempt is held a Federal question and the evidence reviewable, any litigious contemner will be able to frustrate the local courts; their hands will be stayed by the ever present threat of Federal review and lack of ability to pursue the matter. The truth of this assertion would be even more apparent if this court were to find itself unable or unwilling to take judicial cognizance of the local situation reviewed at pages 53-60, *infra*.

**Writ Should Be Dismissed.**

We respectfully submit that the instant writ should be dismissed as one improvidently granted in the absence of a substantial Federal question.[38]

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[38] *Snowden v. Red River, etc. Dist.*, 284 U. S. 592; *Servier Commissior Co. v. Wallowa Natl. Bank*, 287 U. S. 575.

## V.

## The Sufficiency of the Evidence to Sustain the Conviction Is Not Open to Review Here.

This is true, subject only to the single exception that the court, in event of rejecting the reasonable tendency criterion and substituting present danger, would be called upon, as suggested at page 5 of the petition, to determine whether the evidence meets the latter standard; if petitioners are guilty according to the standard they have invoked, their conviction cannot possibly have resulted in a denial of due process or equal protection of the laws.

But if this court holds the reasonable tendency test to be consonant with constitutional requirements, that ends the case; the sufficiency of the evidence then becomes strictly a state question,—a preliminary or conditional fact which is not bound up in the Federal question of what criterion the Constitution demands. The Federal question arises, if at all, upon the legal controversy as to the requisite standard of contempt, not upon the distinctly separate question of fact as to whether that standard has been met.

The rule that this court will review the evidence to determine for itself the existence of a Federal question is limited to cases of necessity.

*Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, was an action upon a policy of life insurance, which resulted in favor of plaintiff. Upon writ of error the Insurance Company claimed that the undisputed evidence established that the policy had never become a completed or binding contract; it also raised the question of whether the same was governed by the laws of Tennessee, Connecticut or Texas. This question of conflict of laws was held to be

Federal. Concerning the matter of insufficiency of the evidence, the court said at page 394:

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. * * * To this general rule there are two equally well-settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' * * * This case comes within the general rule, and not within either of the exceptions. The fact decided is that the policy sued upon was delivered as a completed and binding contract. The Federal question presented arises from the ruling of the court that the Texas, and not the Tennessee, statute, controls this contract. The asserted Federal right was not denied as a result of the finding of fact; nor are the conclusions in respect of the Federal right and the finding interdependent, or so intermingled as to cause it to be necessary to consider the latter in order to pass upon the former. That the contract was effective is a fact equally consistent with the determination of the Federal question either way."

And the fact that the instant publications had a certain tendency is an independent fact which is equally consistent with determination of the Federal question either way. If the tendency test is upheld the factual finding supports the judgment; if tendency is rejected the finding of fact falls with it, swept aside as an inconsequential in-

cident of a void judgment. (The *finding* of reasonable tendency is swept away, but the evidence remains as a basis for further inquiry into the dangerous quality of the editorials.)

*Grayson v. Harris*, 267 U. S. 352, was an action to determine title to certain lands in which plaintiffs' rights depended upon proof that they were citizens of the Creek Nation. It was claimed that this court should "review the record in that respect in order to determine whether there was any basis for the claim of Federal right" (p. 357); but the court said:

> "The point that the evidence fails to show, that plaintiffs in error were Creek citizens, presents a pure question of fact. The trial court found they were. The state Supreme Court expressly affirmed the finding, and, recognizing the existence of the Federal question in the case, put its decision denying the Federal right upon an erroneous view of the law. The denial was not the result of the finding of fact, nor is that finding so intermingled with the conclusion of law in respect of the Federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the Federal question. * * * The effect of the finding was to establish the existence of a preliminary fact, related to the Federal right only in the sense that it brought the case within the reach of the Federal law relied on, and called for a determination of the Federal question then presented. In other words, the finding simply established a condition, not as a basis upon which to rest a decision of the question of Federal right one way or the other,

but upon which that question became an issue for consideration and determination. In such case, the ordinary rule applies that the decision of the state court upon a question of fact cannot be made the subject of inquiry here." (pp. 357-358.)

This language seems fully applicable here. The *fact* of the unlawful tendency of the publications relates to the Federal right (the proper standard) only in the sense that it "brought the case within the reach of the Federal law relied on, and called for a determination of the Federal question then presented." If due process has been denied petitioners, it is because of failure to apply the proper legal standard to the evidence, not because of the determination of the proper factual inferences to be drawn from that evidence.

Nor do we have a case where the factual finding is "so intermingled with the conclusion of law in respect of the Federal right as to cause it to be necessary to consider the matter of fact in order to pass upon the Federal question." The cases of *Herndon v. Lowry*[39] and *Cantwell v. Connecticut*[40] fall within this latter category and hence are clearly distinguishable from the matter at bar.

But if it be held that we err in this regard or that a weighing of the evidence in the light of the present danger rule is necessary, we submit that it is ample to support a conviction according to either standard.

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[39]301 U. S. 242.

[40]310 U. S. 296.

**Editorials in Question Were Contemptuous According to Any Suggested Standard.**

Under the above caption we have discussed the background, tenor and effect of the editorials at pages 12-30 of our former brief.

Petitioners now assert that the editorials should be "fairly interpreted in the light of existing local conditions and the well-known views of the Times upon labor disputes" (Br. p. 27), and we feel impelled to place before this court certain "existing local conditions" which are not included in our former brief herein. We quote from our brief in the Supreme Court of California (p. 126, *et seq.*):

> **"The Clear and Present Danger to the Independence of the Los Angeles Superior Court.**
>
> "We are about to refer to matters which were presented to Judge Wilson, of which he could and presumably did take judicial notice, and which this court will likewise take into consideration by application of the same doctrine, for judicial notice applies to proceedings on review as well as in the trial court (Varcoe v. Lee, 180 Cal. at 343; People v. Tossetti, 107 Cal. App. 7, 12; Inyo Marble Co. v. Loundagin, 120 Cal. App. 298, 304; City of Los Angeles v. Pomeroy, 124 Cal. 597, 641)."

We interrupt the quotation to explain facts well known locally. The Superior Court of Los Angeles County has fifty elective judges with no party sponsorship, and the Municipal Court of the City of Los Angeles has thirty judges similarly situated. The newspaper pub-

lishers of Los Angeles believe that the reelection of these judges is largely dependent upon newspaper approval or disapproval, expressed ordinarily through generous publicity or withholding of any. They have consistently nurtured this thought in the minds of our elective judges, many of whom hold to the same view. There are at least 1,600,000 voters in Los Angeles County and 900,000 in the city alone; the 1938 figures are comparable.

The wide circulation of the Los Angeles Times is alleged [R. 10] and admitted [R. 29].

> "That said 'Los Angeles Times' has now and at all times herein mentioned had a circulation of over 200,000 copies per day most of which said copies of said paper are now and at all times mentioned herein were circulated and read in the City of Los Angeles, and County of Los Angeles, State of California." [R. 10.]

The fact of its circulation in and about the courthouse, of its being read by a large number of the fifty incumbent judges, is within the judicial knowledge of the Superior Court.

*Toledo Newspaper Company v. United States* is in point. The opinion of the Circuit Court of Appeals (later affirmed) had this to say on the subject (237 Fed. at 991):

> "It is urged that the record does not show that the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the courthouse corridors, on the

steps, or in the immediate vicinity of the courthouse. If these facts are essential, they may and should be presumed in support of the judgment. There is no proof to the contrary, and it is highly probable that in a city like Toledo, and with a courthouse situated as it there is, an afternoon paper, with a daily circulation of 50,000, and with five editions each day, not only is read every day by the great part of the reading public, including the judges, but is cried and sold by the hundreds and thousands under the courthouse windows, and is brought into, if not sold in, the corridors and offices of the building. We refer to these presumptions and probabilities only to indicate that the lack of precise allegation or proof as to these facts cannot, in any event, be fatal, but without intending to decide whether these facts may be necessary."

These are some of the things which the California Supreme Court had in mind when it said:

"These expressions of approval of the verdict and condemnation of the convicted defendants made *by such an influential paper* as the Los Angeles Times on the day just preceding the day fixed by the court for pronouncing sentence *could not help having an effect upon the trial judge*, who, as we have seen, was clothed with a wide discretion in fixing the punishment of the convicted defendants, to say nothing respecting his duties in case a motion for a new trial was made or an application for probation was presented to him." [R. 128.]

We resume the quotation from the brief:

"The Los Angeles Bar Association's Committee for Preservation of Judicial Independence was formed at the urgent suggestion of the Presiding Judge who was in office during the year 1937, and it grew out of conditions resembling those of the Shuler era[41] when he, through threats and flattery, was engaged in an endeavor, which for a time approached appallingly close to success, to impose his will upon the judges of the Superior Court concerning any litigation in which he happened to take an interest. But the recent conditions, which were becoming progressively worse, involved a somewhat contemporaneous series of drives upon the judges by various pressure groups, such as the AFL and CIO; at the same time the practice of trying cases in the newspapers was growing in extent and obnoxiousness, and many attorneys were unfortunately lending themselves to the practice of giving to the newspapers advance statements of their views concerning the merits or the evidence about to be produced. A committee of one of the above mentioned labor organizations called upon the Presiding Judge in an effort to persuade him to replace the judge then in charge of the Order to Show Cause Department[42] with a judge whose economic and social views would be more acceptable to that labor organization. At about the same time

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[41] *In re Shuler*, 210 Cal. 377.

[42] The Department of the Superior Court which handles preliminary injunctions, special writs and the like.

one Heist, speaking on behalf of one of those organizations, delivered over the radio a diatribe directed at the judge presiding in the Order to Show Cause Department, and he mailed a copy of it to the then Presiding Judge. During litigation between McPherson and Crawford[43] someone mailed to each of the Superior Court judges a copy of one or more issues of a small newspaper which was freely discussing the merits of the case about to come to trial. During the Markham Will case the Hollywood Red Ink, a newspaper (reputed to be controlled by one of the attorneys in that litigation), took such an active and partisan interest in the case that it became wellnigh impossible for the attorney of the contestee to find a judge who would act on any matter pertaining to the case, even though it related to a rather formal phase of it. During the pendency of the litigation involving the San Pedro Hiring Hall (which is mentioned in the Bulcke case now under submission, LA 16804),[44] telegrams of Bulcke, Wahlenmaier and others were received by Judge Schmidt, the trial judge, seeking to influence his action upon matters such as motion for new trial, etc. And Harry R. Bridges, during that same proceeding, made an affidavit which, filed by Mr. Katz, one of the attorneys for defendants, resulted in his (Katz) punishment for contempt; the judgment was upheld by the rul-

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[43]Litigation between Aimee Semple McPherson and Rheba Splivalo Crawford concerning the Four Square Gospel Church.

[44]Decided in 14 Cal. (2d) 510 and 14 Cal. (2d) 799.

ings of the District Court of Appeal and this court in Matter of Katz, Second Civil No. 11806. Bridges also sent to the Secretary of Labor and caused the newspapers to publish pertinent portions of a telegram relating to that litigation, which telegram on its face sought nothing of Madame Perkins and was obviously calculated through its publication to come to the attention of Judge Schmidt and to influence his decision; the contemptuous nature of this communication has been finally adjudicated in Bridges v. Superior Court, S. F. 16174.

"All of these things occurred before the hearing of the Times case. During its progress the semi-annual report of Judge Wilson concerning the Order to Show Cause Department was rendered to the Presiding Judge and revealed the fact that 41 contempt matters had been handled in that department during the six months' period; but this covered only the one department of the court, and we have no way of knowing how many additional contempt matters there were. The above mentioned instances, some of which occurred before 1938, are but outstanding examples of a growing tendency of outsiders to attempt to bring pressure upon the court to render what they conceive to be just judgments. And among the 41 matters handled by Judge Wilson was the instance of the labor sympathizer who tied to a string a copy of the temporary injunction rendered in a labor dispute and publicly dragged it in the gutter, a thing which was duly publicized and became a matter of common knowledge.

"While these things were occurring, most of them being attempts of the labor faction to impress their views upon the court, the Los Angeles Times, absorbing the spirit of the moment, fell into line and adopted or revived a policy of publishing editorials concerning the merits of these pending matters, again largely labor disputes; and these editorials became increasingly bold until they culminated in 'Probation for Gorillas', wherein the Times directly addressed the trial judge and told him in no uncertain terms that on account of consideration of public policy (regardless of his view of the sufficiency of the evidence or the existence or gravity of errors or of extenuating circumstances) probation should be denied as an alternative to the commission of a grave mistake.[45] The attitude of labor toward the courts had fairly indicated that there would be no hesitation in bringing pressure to bear upon the judge to grant probation to Shannon and Holmes, and it is a fair inference that the Times, foreseeing this, determined

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[45]The gratuitous assertion that the Times proceeding was instituted only as a result of "a systematic survey of editorials that had appeared in the 'Times' over a period of approximately six months" (Hanson Br. p. 16) and that the Times' "editorial columns had been searched over a period of some six months in the hope that something would turn up to support a charge of contempt" (*Id.* p. 17) is without any foundation. As a matter of fact, efforts were being made by the Bar Association Committee while these editorials were appearing to arrive through conference at some satisfactory solution of the growing practice of addressing the courts upon pending cases. But The Times would have none of it. And when it finally published "Probation for Gorillas" the Presiding Judge of the Superior Court brought the matter to the attention of the Bar Association Committee who forthwith instituted the contempt proceeding, including the five editorials set forth in the Elkins affidavit.

that, if within its power, it would prevent the successful exercise of that sort of influence and substitute its own judgment as that of the court. Petitioners have virtually admitted the contemptuous nature of one of the editorials [Tr. p. 66, line 21].

"And so we have here illustrated the grave evil of extramural arguments concerning pending matters. Labor, on the one hand, attempting to coerce the court into granting probation, and the Times, on the other, threatening and scolding that probation should not be granted. If it be necessary to this proceeding to prove the existence of a clear and present danger, according to Mr. Wirin's doctrine, then we have it clearly in the County of Los Angeles, at the time of the institution of the instant proceeding."

If the discussion of the editorials, found at pages 12-30 of our former brief herein, be read in the light of these well known "existing local conditions" and the "well-known views of the Times upon labor disputes", as elaborated in the Chandler affidavit [R. 44], the immediate danger of interference with the court proceedings becomes clearly manifest.

This conflict between the alleged prerogatives of the press and the independence of the courts is neither new nor local. In an appendix hereto we have incorporated some interesting lay comments on the subject.

## VI.

## New Arguments Concerning "Probation for Gorillas".

This is the editorial of which the California Supreme Court said:

> "But little is said, or can be said, in defense of the publication of this editorial" [R. 131],

and that:

> "* * * petitioner, The Times-Mirror Company, advances no serious defense of its publication of said editorial in so far as the character and nature of the editorial are involved * * *." [R. 131.]

### Petitioners' Claim That Probation Would Not Lie.

In addition to the matters suggested in their former brief herein, counsel for petitioners now advance the argument (Br. pp. 6, 31) that an application for probation would not lie in the case of Shannon and Holmes and inferentially that "Probation for Gorillas" related to a proceeding that was entirely *coram non judice*.

Let it be assumed *arguendo* that the court could not properly grant probation in this instance. It does not follow, however, that its entertaining the application was not a judicial function whose exercise must be free of extraneous influence. In other words, when defendants applied for leave to file an application for probation, the court was required to determine that same would not lie or that same might be filed for the purpose of further

considering the question of the applicability of the probation statute to the crime in question. So long as that point was under consideration, the court was exercising a judicial function which might or might not result in error, or even in excess of jurisdiction, but which, under settled principles, is and must be protected from extraneous influence in the same manner and to the same extent as the performance of any other judicial act.

The law is well settled by such cases as the following:

*Gompers v. Buck's Stove & R. Co.*, 221 U. S. 419, 450;

*United States v. Shipp*, 203 U. S. 563, 572;

*United States v. Toledo Newspaper Co.*, 220 Fed. 458, 494-5 (D. C.);

*United States v. French*, 9 Fed. Supp. 30, 31-32 (D. C. Mich.);

*Russell v. United States*, 86 Fed. (2d) 389, 392 (8th C. C. A.);

*Howat v. Kansas*, 258 U. S. 181, 189.

The plain distinction between a right to refuse to carry out a void order and an attempt to influence the court's determination of whether it has jurisdiction to make the order is well drawn in the *Russell* case, *supra*.

If jurisdiction to grant probation were essential to the existence of a contempt in this instance, it would nevertheless appear that the court had power to reduce the crime to one of simple assault (Penal Code, Sec. 1182, Subd. 6), one not involving use of a deadly weapon, in which event probation would unquestionably lie.

That Judge Scott was acting within his jurisdiction in permitting filing of application for probation by Holmes

and Shannon is not open to question. *People v. Tufano*, 7 Cal. App. (2d) 561, 562:

> "There is nothing in the provisions of Sec. 1203 of the Penal Code which precludes the filing of a probation application, even though by its terms probation may not be granted, as in the instant case. The inquiry was obviously advantageous to appellant, since the penalty imposed was commitment to the county jail, which fixed the crime as a misdemeanor in lieu of a penitentiary sentence."

**Editorial Not Limited to Matter of Probation.**

It must also be remembered in considering "Probation for Gorillas" that it not only advised Judge Scott to deny probation, but insisted upon his exercising his discretion by way of making the crime a felony and sentencing defendants to the jute mill at San Quentin. This phase of the matter was discussed by the Supreme Court at R. 133.

**Argument Concerning Penal Code Section 166.**

In this same connection, petitioners assert (Br. p. 3, footnote 1) that they "were not prosecuted for violation of California Penal Code Sec. 166, Subd. 8, which is relied on by respondent to sustain the judgment in respect to 'Probation for Gorillas'?" Apparently the thought is that this definition of contempt has no application at bar. It reads:

> "Criminal contempts. Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:
>
> * * * * * * * *
>
> "8. Presenting to any court having power to pass sentence upon any prisoner under conviction, or to any member of such court, any affidavit or testi-

> mony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this code."

This is but a declaration that a violation of Sec. 1204, Penal Code, constitutes a contempt. That section declares the substantive law as follows:

> "* * * No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section."

Such a contempt may be prosecuted by indictment or pursuant to the Code of Civil Procedure.[46]

The fact that the substantive law is found in the Penal Code rather than the Civil Code or Code of Civil Procedure is immaterial, for the Codes are to be read together as a single statute.[47] It is clear that the statute governs at bar.

It is likewise clear under the *Shuler* decision, 210 Cal. at 401, that the publication was contemptuous regardless of the specific statutory prohibitions.

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[46]See: *In re Morris*, 194 Cal. 63; No. 19, R. 142-44; *Jurney v. MacCracken* 294 U. S. 125, 151.

[47]*Pol. Code*, Sec. 4880; *Proctor v. Justice's Court*, 209 Cal. 39, 43.

It is submitted that no good ground for certiorari has been shown; that the writ should be dismissed; that the judgment herein should be affirmed in all respects.

Respectfully submitted,

WM. B. MCKESSON,
*Deputy County Counsel,*
ALLEN W. ASHBURN,
MICHAEL G. LUDDY,
ISAAC PACHT,
By ALLEN W. ASHBURN,
*Attorneys for Respondent.*

*Of Counsel:*

ARNOLD PRAEGER,
J. H. O'CONNOR,
*County Counsel;*
DOUGLAS DECOSTER,
*Chief Deputy County Counsel;*
S. V. O. PRICHARD,
*Assistant County Counsel.*

## APPENDIX.

Arthur Train's "From the District Attorney's Office" (p. 415) says:

> "Yet these considerations are of slight moment in contrast to that most crying of all present abuses—the domination of the courtroom by the press. It is no fiction to say that in many cases the actual trial is conducted in the columns of yellow journals and the defendant acquitted or convicted purely in accordance with an 'editorial policy.' Judges, jurors, and attorneys are caricatured and flouted. There is no evidence, however incompetent, improper, or prejudicial to either side, excluded by the judge in a court of criminal justice, that is not deliberately thrust under the noses of the jury in flaring letters of red or purple the moment it leaves the courtroom. The judge may charge one way in accordance with the law of the land, while the editor charges the same jury in double-leaded paragraphs with what 'underwritten' law may best suit the owner of his conscience and his pen."

"Trial by Newspaper" (66 United States Law Review 374), the author being Stuart H. Perry, who was first a lawyer, then managing editor of a newspaper, publisher of another, and finally a director of the Associated Press and a member of the advisory committee of the Columbia University School of Journalism, says, in part, at page 377:

> "Trial by newspaper has always been recognized by sound thinkers as pernicious. Yet we are still afflicted, and in an increasing degree, with an evil that has been an object of continual protest and warning for a century. It is a disease that does not cure itself."

And at page 379:

> "Trial by newspaper could be stopped tomorrow, if judges would use the contempt powers that are in their hands. Why they do not is thus clearly stated by Clarence Darrow:
>
> "'Trial by jury is rapidly being destroyed in America by the manner in which the newspapers handle all sensational cases. I don't know what should be done about it. The truth is that the courts and the lawyers don't like to proceed against newspapers. They are too powerful. As the law stands today there is no important criminal case where the newspapers are not guilty of contempt of court day after day. All lawyers know it, all judges know it, and all newspapers know it. But nothing is done about it. No new laws are necessary. The court has full jurisdiction to see that no one influences a verdict or a decision. But everyone is afraid to act.'
>
> "The reason why they fear the power of the newspapers is because that power is political power. It affects public opinion, and therefore it controls votes. Thus, the poison of politics which causes trial by newspaper also prevents its cure."

The views of enlightened newsmen are interesting. For instance, an article by William Allen White, entitled "How Free Is the Press?", beginning at page 16 of the issue of Collier's for April 8, 1939, contains this at pages 88-89:

> "The old editor, horsewhipped, shot at, sued for libel, has passed out of our civilization with the king's fool and the minnesinger, the jousting knight and the chimney sweep. More than that, the implications of

property in the words 'the press' carry heavy social as well as economic rights. The bank, broker, oil-man or capitalist who buys a newspaper buys something more than the presses. The modern publisher buys the right to hire and fire editors who have served their apprenticeship, who know and should respect the code of the profession. For they, being for the most part innocent of property, are still professional men. The publisher buys their professional equipment with the presses and linotypes. By reason of his property rights he can direct these professional editors.

"And there's the rub. For all these hired editorial minions—that is to say managing editors, editors in chief, desk men, reporters and editorial writers—he, the publisher, holds under his directing hands. He may own also a steel mill or a bank. He may operate a chain of newspapers or a block of real estate or own a big box full of bonds. We professional journalists who work for him watch the baton that he wields. We watch his directing baton because he has power. Too often his qualities become idealized by those who serve him. All journalism from top to bottom almost instinctively and quite unconsciously tends to be affected with the owner's sense of property.

"Thousands and tens of thousands of editors, advertising salesmen, circulators, reporters and copy choppers seem to have forgotten their professional habits, customs and inhibitions in a business that by reason of its size and strength has finally become first of all an investment. But often other thousands and tens of thousands of men and women in our profession realize things that many publishers forget."

Again at page 89:

> "But the social bias often comes with a property sense in the heart of the investing publisher. He is sadly liable to let his sense of property bias his instinct for justice. Then that modern caliph of Bagdad creates another problem. The problem of the newspaper as an investment rather than a profession puts the question of the new freedom of the press in a nutshell."

A complement to Mr. White's article is found in Fortune for August 1939 in an article entitled "The Press and the People—A Survey". The Fortune article contains this among its introductory paragraphs (p. 64):

> " 'So far as the freedom of the press is concerned, there has been more cant written than on most subjects, and that is saying a good deal', said the editor of the New York Herald. That was in March, 1876. Press freedom is still being held up as the day's burning issue by leaders of the industry, but now, as then, eloquent self-critics see it differently. Mark Ethridge, general manager of the Louisville Courier-Journal and Times, told the University of Missouri School of Journalism last May that the cry nowadays about freedom of the press 'is equivalent to the American Army going into the World War shouting "Free the Slaves". . . . The Press in America can lose its freedom, of course, but if it does, it will be primarily its own fault. The freedom of the press can be lost through economic adversity . . . that comes from bad management, from lack of adaptability.' William Allen White put it even more sternly: 'If a free press is in danger, we need not fear outside sources. We need to fear ourselves'."